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IN THE CIRCUIT COURT OF RANDOLPH COUNTY, WEST VIRGINIA

DAVIS MEMORIAL HOSPITAL,
Petitioner,

v.

Civil Action No.: 07-C-9

WEST VIRGINIA STATE TAX COMMISSIONER,
Respondent.

ORDER

A.) Factual Background

This matter came before the Court on Davis Memorial Hospital's (hereafter Petitioner) appeal from a decision by the West Virginia Office of Tax Appeals, which denied Petitioner's request for a refund in the amount of \$799,501.16 from the calendar year 2002.¹ The Petitioner had initially filed a claim for refund of West Virginia consumers sales tax and West Virginia use tax on May 9, 2005, which was denied by the Tax Department, precipitating the appeal to the Office of Tax Appeals. In the instant matter, briefs were submitted on behalf of both parties and oral argument conducted before the Court, with both parties appearing by counsel on April 18, 2007.

B.) Resolution of Petitioner's Outstanding Motion to Vacate Remand and for Entry of Judgment.

At the conclusion of the oral argument, the Court requested the parties to submit Findings of Fact and Conclusions of Law, which were promptly tendered and taken under consideration by the Court. The Court, by Order entered on June 14, 2007, remanded this case to the Office of Tax

¹ Davis Memorial Hospital, Inc. v. State Tax Commissioner of West Virginia, 05-399 RC (2006).

Appeals for further development of one of the two issues presented to the Court on appeal. The June 14, 2007 Order also held the Court's decision on the remaining issue until the Office of Tax Appeals had more fully developed the record on the issue that was remanded.

The Petitioner presented two issues on appeal. The first issue, hereafter Issue 1, was styled as follows:

1.) As the OTA Order correctly states, this case is about which elements of Petitioner's income constitutes "support" for the purposes of the statutory "support test" applied to non-profit organizations, as "support" is defined in the West Virginia Code. Petitioner is exempt from sales and use tax if it "annually receives more than one half of its support from *any* combination of gifts, grants, direct or indirect charitable contributions or membership fees . . ." W.Va. Code § 11-15-9(a)(6)(C) (emphasis added). Using the correct definition of "support" found in W.Va. Code § 11-5-9(a)(6)(F)(i), Petitioner passes this support test for the year in its claim for refund.

Petitioner's Brief, at 2. The second issue before the Court on appeal, hereafter Issue 2, was presented as follows:

2.) The OTA Order incorrectly fails to hold that Petitioner is entitled to a refund for the calender year 2002 for \$527,797.19 in Consumers' Sales and Services Tax actually paid (total claim for the refund \$799,501.16 having also paid \$271,703.97 in use tax). Instead the OTA Order merely recognizes that although Respondent can confirm from its internal records that Petitioner has paid \$463,209.40 in Consumers' Sales and Services Tax in calender year 2002 that certain vendors were not registered with the Respondent and, therefore, Respondent could not confirm that \$64,587.79 was paid. Using the correct legal standard found at W. Va. Code § 11-15-3(a), Petitioner is entitled to credit in the full amount of sales tax paid of \$527,797.19.

Id., at 2.

This Court's decision to remand Issue 2 for further development was premised on an examination of the record from the OTA (Office of Tax Appeals). Specifically, this Court found ample evidence presented in the OTA written opinion to consider and decide Issue 1. The record was

less developed with respect to Issue 2. The Office of Tax Appeals made nine "Findings of Fact."

Finding of Fact Number 7 states,

The Respondent has presented evidence, which, according to him, shows that the Petitioner is not entitled to credit for the entire amount of consumers' sales and service tax that it paid, because certain of those vendors were out of state vendors who were not authorized to collect consumers' sales and service tax on behalf of the State Tax Commission and remit the same to him.

Davis Memorial Hospital, Inc. v. State Tax Commissioner of West Virginia, 05-399 RC, at 4.

Finding of Fact 8 also addresses Issue 2. "The Respondent maintains that the Petitioner is not entitled to credit for \$64,587.79 that paid to vendors who were not authorized to collect the tax on behalf of the State Tax Commissioner." *Id.* From this point, there was no further mention in the OTA's opinion concerning Issue 2. The Court could not find any mention of Issue 2 within the ten page "Discussion" section of the opinion and there is no specific "Conclusion of Law" resolving the issue. The above stated reasons led the Court to hold on a resolution of Issue 1, while remanding the case to the Office of Tax Appeals for further development of the record on Issue 2.

After the issuance of the remand Order, this Court received Petitioner's "Motion to Vacate and Remand and for Entry of Judgment." The motion, filed on June 25, 2007, informed the Court that the Petitioner wished to waive Issue 2, which was remanded by this Court to the Office of Tax Appeals. Petitioner instead requested that the Court issue a formal decision on Issue 1, *post haste*. The West Virginia State Tax Commissioner did not object to the motion. Petitioner's "Motion to Vacate Remand and For Entry of Judgment" is therefore GRANTED with respect to Petitioner's request to Vacate the previous Remand. The Court now proceeds to resolve the questions presented by Petitioner's Issue 1.

C.) Procedural History and Standards of Review

The Petitioner filed a claim for a refund of consumers' sales and service tax and purchasers' use tax in the amount of \$799,501.16 for the calendar year 2002. The Sales Tax Unit of the Internal Auditing Division ("the Division") of the West Virginia State Tax Commissioner's Office ("the Commissioner" or the "Respondent"), by letter dated May 12, 2005, denied the claim. Davis Memorial Hospital Center, Inc., v. State Tax Commissioner, 05-399 RC, at 2 (2006). The Petitioner filed a timely petition for refund with The West Virginia Office of Tax Appeals, which was received on July 8, 2005. Id., at 3. The Office of Tax Appeals properly accepted the petition pursuant to W. Va. Code §§ 11-10A-8(2) [2002] and 11.10A.9(a)-(b) [2002]. Id. Notice of hearing on the petition was sent to the Petitioner and a hearing was held in accordance with the provisions of W. Va. Code § 11-10A-10 [2002]. Id. The Final Decision of the West Virginia Office of Tax Appeals denied the Petitioner's request for refund in the amount of \$799,501.16 by written Order, issued on November 15, 2006. Id., at 17.

This Court accepted jurisdiction of this appeal, pursuant to W. Va. Code § 11-10A-19 *et seq.* "Either the taxpayer or the commissioner, or both, may appeal the final decision or order of the office of tax appeals by taking an appeal to the circuit courts of the state within sixty days after being served with notice of the final decision or order." W. Va. Code § 11-10-19(a). Venue is proper in the Circuit Court of Randolph County, pursuant to W. Va. Code § 11-10A-19(c)(1)(A) & (B). The Court notes finally that the Petition was filed timely, in accordance with W. Va. Code § 11-10A-19(a) (appeal may be taken within sixty days of decision appealed).

The standard of review for an appeal to the Circuit Court from a decision of the West Virginia Office of Tax Appeals was stated in Concept Mining, Inc., v. Helton, 217 W. Va. 298, 299, 617

S.E.2d. 845, 846 (2005), citing *Appalachian Power Co. v. State Tax Department of West Virginia*, 195 W. Va. 573, 466 S.E.2d 424 (1995) Syl. Pt. 1, stating that, "interpreting a statute or an administrative rule or regulation presents a purely legal question subject to *de novo* review."

D.) Discussion

Petitioner is a not-for-profit hospital located in Elkins, West Virginia. The hospital provides professional medical services to patients in the hospital on an in-patient and out-patient basis. The tax exempt purpose of the hospital under Section 501(c)(3) of the Internal Revenue Code of 1986 is to provide healthcare services to the community in which it is located.

Petitioner's appeal asks this Court to examine and interpret the statutes that comprise tax law within West Virginia. Petitioner's specific contention asks this Court to assign an interpretation of W. Va. Code § 11-15-9(a)(6)(C) that differs from the interpretation given by the OTA. Petitioner avers that the definition assigned to the term "support" within what is known as the statutory support test applied to non-profit organizations was incorrect as interpreted by the OTA. Petitioner is exempt from sales and use tax if it "annually receives more than one half of its support from an combination of gifts, grants, direct or indirect charitable contributions or membership fees" W. Va. Code § 11-15-9(a)(6)(C). Petitioner's contends that "support" as listed in the previous statutory passage was misinterpreted. "Support" is defined in W. Va. Code § 11-5-9(a)(6)(F)(i) as:

[g]ross receipts from fund raisers which include receipts from admissions, sales of merchandise, performance of services or furnishing of facilities in any activity which is not an unrelated trade or business within the meaning of Section 513 of the Internal Revenue Code of 1986, as amended . . .

W. Va. Code § 11-15-9(a)(6)(F)(i)(II).

As previously stated, the Petitioner argues that the OTA misinterpreted this statute by misquoting and hence misapplying W. Va. Code § 11-15-9(a)(6)(F)(i)(II). Petitioner's brief initiated this argument by presenting the Court with a grammatical analysis of the statute. The concept of restrictive versus non-restrictive clauses was portrayed as providing the decisive interpretation favoring the refund that the Petitioner requested. While the Court declines to regurgitate the entire grammatical lesson provided by the Petitioner, the Court finds this legal rationale insufficient to overturn the OTA's holding.

Briefly summarizing this section of Petitioner's argument, the brief points to the lack of a comma following the word "which" in the first line of W. Va. Code § 11-15-9(a)(6)(F)(i)(II) to support the desired result. Petitioner asserts that because there is no comma present, the statute should be viewed as a restrictive clause. In accepted English grammar, a restrictive clause restricts the object that it modifies. Correctly stated in Petitioner's brief, "it cannot be omitted from the sentence without changing the sentence's meaning entirely because the object as modified means something more specific than it would without the restrictive clause." Petitioner's brief, at 4. The non-restrictive clause simply adds information that could have been restated separately. *Id.*, citing, *Rhodes v. County of Darlington, S.C.*, 833 F.Supp. 1163, 1191 n. 18 (D.S.C. 1992).

Under Petitioner's theory of this case, W. Va. Code § 11-15-9(a)(6)(F)(i)(II), the lack of comma following "which" requires the phrase to be restrictive. As applied to the statute and Petitioner's situation, "support" means not any "gross receipts from fund raisers" but only certain "gross receipts from fund raisers." Petitioner's interpretation of the statute would then have the Court find that "gross receipts from fund raisers" include *only* the enumerated activities listed in the statute:

“(1) admissions, (2) sales of merchandise, (3) performance of services or (4) furnishing of facilities in any activity which is not an unrelated trade or business. (emphasis added)

The practical effect of the Petitioner’s argument is clearly seen in the Office of Tax Appeals Order. In its Findings of Fact, the Office of Tax Appeals found that the total sum of “gross receipts from admissions, sales of merchandise, provision of services, or furnishing of facilities in any activity that is not an unrelated trade or business” for Davis Memorial Hospital in the time period in question was \$64,180,500.00. OTA Order, 05-399, at 3. Petitioner’s interpretation of the statute would reduce the figure from \$64,180,500.00 to \$0. Not suprisingly, the effects of the competing classifications for the \$64,180,500.00 as applied to Davis Memorial Hospital are profound. Petitioner’s classification produces the Petitioner’s requested refund for the calendar year 2002 and likely works towards similar results for following years. The Respondent’s classification eliminates the Petitioner’s refund.

To meet the exemption that Petitioner requests, three requirements would need to be met. The OTA Order acknowledged that two of the three requirements were satisfied.² The third requirement is where Petitioner’s request for a refund faltered. It mandates that “any gifts, grants, contributions or membership fees” received by it exceed one half of its total “support,” as the term is defined in various items listed in subsections (F)(i)(I)-(VI). Petitioner conceded in brief to this Court that “[i]t is undisputed that Petitioner’s exempt purpose income does not fall within either of the other five categories of support in subparagraphs (I) or (III) through (VI). See Petitioner’s brief, at 3, fn. 2.

² The two requirements that the Petitioner met were: (1) It is “a corporation or organization which as a current registration certificate issued under article twelve [§§ 11-12-1 *et seq.*] of this chapter.” The second requirement is that “it must be exempt from federal income taxes under Section 501(c)(3) or (c)(4) of the Internal Revenue Code of 1986.”

The OTA Order expressed the above mentioned formula in equation form:

$$\frac{I}{I + II + III + IV + V + VI} \text{ is greater than } .50 (50\%)^3$$

Petitioner's application of its theory under its interpretation for 2002 was:

$$\frac{1,579,265}{1,579,265 + 0 + 115,847 + 702,836 + 0 + 0} = \frac{1,579,265}{2,397,948} = .6586 (65.86\%)$$

Using this analysis, Petitioner's contention that its "support" derived from gifts, grants, contributions or membership fees for the calendar year 2002 exceeded one half, or 50% of its support for that year, and it would be entitled to a refund of its consumers' sales and service tax and purchasers' use tax paid on its purchases for that year.

However, under the interpretation supported by the Respondent and accepted in the OTA Order, the first zero in the denominator of the above equation is assigned the value of \$64,180,500.00. The result of this switch takes the Petitioner well below the 50% threshold needed for a grant of a tax refund.

$$\frac{1,579,265}{1,579,265 + 64,180,500.00^4 + 115,847 + 702,836 + 0 + 0} = \frac{1,579,265}{66,577,476.00^5} = (.0237\%) = 2.37\%$$

The core of Petitioner's contention that the sum of \$64,180,500.00 should not be included in sums designated "gross receipts from fund raisers" is that the receipts from the operation of the

³ See, OTA Order 05-399, at 6.

⁴ Emphasis added.

⁵ See, OTA Order 05-399, at 7.

hospital and its related facilities and services are not "gross receipts from fund raisers." Petitioners argue that those receipts should not factor into the determination of support. This Court agrees with the Office of Tax Appeals Order, in that,

[t]he clear, express and unambiguous language of the statute makes it apparent that receipts from activities expressly listed in W. Va. Code § 11-5-9(a)(6)(F)(i) are included in 'gross receipts from fund raisers.' These include: 1.) Receipts from admissions in any activity which is not an unrelated trade or business; 2.) Receipts from sales of merchandise in any activity which is not an unrelated trade or business; 3.) Receipts from the performance of services in any activity which is not an unrelated trade or business; and 4.) Receipts from furnishing of facilities in any activity which is not an unrelated trade or business. (emphasis added by OTA Order)

OTA Order, 05-399, at 12.

This Court is reminded "that the parties disagree as to the meaning or the applicability of [a statutory] provision does not of itself render [the] provision ambiguous or of doubtful, uncertain or obscure meaning." *Trustees of Firemen's Fund v. City of Fairmont*, 215 W. Va. 366, 370, 599 S.E.2d 789, 793 (2004); *Deller v. Naymick*, 176, W.Va. 108, 112, 342 S.E.2d 73, 77 (1985). *Estate of Resseger v. Battle*, 152 W. Va. 216, 220, 161, S.E.2d 257, 260 (1968). In the realm of statutory interpretation, this Court is also cognizant that "[r]ules of interpretation are resorted to for the purpose of resolving an ambiguity, not for the purpose of creating it." *Deller v. Naymick*, 176, W.Va. at 112, 342 S.E.2d at 77; *Crocket v. Andrews*, 153 W. Va. 714, 719, 172 S.E.2d 384, 387 (1970). Petitioner's challenge to the denial of a request for a tax refund, while novel, lacks support and only seeks to cloud what had been a clear area of West Virginia tax law. This Court declines to create ambiguity where there was none present.

The record established in the OTA Order, in addition to the examination of pertinent West Virginia case law, convinces this Court that a legislative intent was clear, in so much that receipts

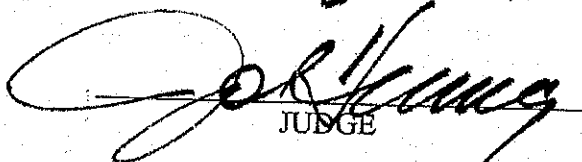
from *all* activities, including those from admissions, sales of merchandise, performance of service and furnishing of facilities, so long as they are derived from a related trade or business, were to be included as "gross receipts from fund raisers." (emphasis added) This results in the inclusion of Petitioner's income from providing services in the amount of \$64,180,500.00.

E.) Conclusion

For all the foregoing, the holding of the Office of Tax Appeals, denying Petitioner Davis Memorial Hospital, Inc. a refund for sales and use tax for the 2002 calendar year is **AFFIRMED**. Petitioner's "Motion to Vacate Remand and for Entry of Judgment" which was granted in this Order, waived any appeal or interest in Issue 2 of Petitioner's Memorandum in Support of Petitioner for Appeal. Any future proceedings in this matter are limited to consideration of matters contained in Issue 1. The Petitioner's right of appeal is noted. This case is **DISMISSED** and **REMOVED** from the Court's active docket.

The Clerk of this Court is directed to **FORWARD** a copy of this Order to Petitioner's Counsel, Mr. Robert A. Wilson, Jr. and Respondent's counsel L. Wayne Phillips, West Virginia Assistant Attorney General. It is, so **ORDERED**.

Entered this the 27 day of June, 2007.


JUDGE

A TRUE COPY:
ATTEST:
PHILIP D. RIGGLEMAN
CLERK OF THE CIRCUIT COURT
BY Myron DEPUTY

ENTERED

JUN 27 2007
Civil ORDER BOOK
NUMBER 82 PAGE
PHILIP D. RIGGLEMAN, CLERK
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By: Myron Deputy

cc: Wilson
Phillips